Maxis Communications Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2(3)–25–335 OF 2008
MOHD ZAWAWI J
29 APRIL 2011

Revenue Law — Income tax — Assessment — Tax treatment of equivalent cash consideration ('ECC') received by applicant's employees holding unvested options pursuant to conditional take-over offer — Whether payments made pursuant to the ECC must be reported as employees' income for the year in which option was released — Whether the ECC received by employees fell under s 25(1A) of the Income Tax Act 1967 — Prerequisites to the application of s 25(1A)

This case revolved around the tax treatment of the equivalent cash consideration ('ECC') received by the applicant's employees who held unvested options, pursuant to the conditional take-over offer ('the offer') made by Binariang GSM Sdn Bhd ('Binariang'). On 1 July 2002, the applicant implemented the 2002 Maxis Employee Share Option Scheme ('Maxis ESOS') where eligible employees were granted options in respect of the applicant's shares, the terms and conditions of which were set out in the Amended and Restated ESOS Bye-Laws of Maxis Communication Bhd ('Maxis Bye-laws'). After the options had been accepted by the eligible employees through the acceptance form, the option would be vested based on the vesting schedule as agreed by both parties and the option shall be exercisable at the relevant times. On 24 May 2007, Binariang launched the offer to acquire all voting shares in the applicant's company. Parallel to the offer, ECC offers were made to the appellant's employees in respect of unvested options. Under the ECC, the employees received an alternative consideration in substitution or in cancellation of all outstanding unvested options. The cash amount would only be paid to them in tranches according to the original vesting schedule applicable to the outstanding options. The applicant took the stand that the payments made pursuant to the ECC to its employees must be reported as income in its employees income statement for the year in which the option was released, as enunciated in s 25(1A) of the Income Tax Act 1967 ('the Act') and the treatment to tax the income fell under s 32(1A) of the Act. The respondents however decided that the ECC received by the applicant's employees for the unvested option did not fall under s 25(1A) of the Act. The applicant applied for judicial review seeking an order of certiorari to quash the respondents' decision. The question that arose for decision was whether payment received by the applicant's employees for the unvested options in terms of ECC should be treated as its employees' income for the year in which its employees received

such payment or for the year in which its employees exercised, assigned, released or acquired the options granted to them.

Held, allowing the application with costs:

(1) The prerequisite to the application of s 25(1A) of the Act is the existence of the right to acquire share. In the present case, this existence could only be traced from the respective documents, namely, letter of offer and acceptance, Maxis Bye-Laws and Employee Share Option Scheme Benefit Public Ruling No 4/2004 from which the right is derived and/or granted as it is nowhere defined in the Act itself. Under cl 6 of the Maxis Bye-Laws, each grant under the Maxis ESOS plan was made by a formal offer of the applicant's company which was accepted by their eligible employees and supported by binding consideration of RM1. This created a legally binding contract where the latter were granted enforceable rights to shares of the former. This offer became a contract when it was accepted by the respective employee by filling in the acceptance form (see paras 30–31 & 33).

(2) The fact that the options would only be vested based on the vesting schedule was immaterial. This was due to the fact that s 25(1A) does not impose any vesting element before its applicability. What did matter was that, how did the said right arise. In this instant case, the right arose from the binding contract: by virtue of the formal offer to grant options to subscribe for Maxis shares and its acceptance by their eligible employees. Thus, the grant of the option gave rise to a right to acquire shares at the point of the grant (see paras 34–35).

(3) Hence, it was wrong for the respondent to rely on cl 7.1.1 of the Maxis Bye-laws to determine the rise of the right to acquire share under s 25(1A) of the Act. The provision concerns the circumstances when the option become exercisable. It does not relate to the ones which give rise to the right to acquire share in the applicant company (see paras 37–38).

(4) The rights to acquire share in the instant case were released when the respective employees surrendered their unvested options for cancellation. Section 25(1A) was applicable to the gross income in respect of the employees who received payment under ECC and the treatment to tax fell under s 32(1A) of the Act (see paras 46–47).

[Bahasa Malaysia summary

Kes ini adalah berkaitan dengan bayaran cukai bagi balasan tunai bersamaan ('ECC') yang diterima oleh pekerja-pekerja pemohon yang memegang opsyen yang tidak terletakhak, berikutan tawaran pengambilalihan bersyarat (tawaran tersebut) yang dibuat oleh Binariang GSM Sdn Bhd ('Binariang'). Pada 1 Julai 2002, pemohon melaksanakan Skim Opsyen Saham Pekerja-Pekerja Maxis 2002 ('ESOS') di mana pekerja-pekerja yang layak diberikan opsyen berkaitan

dengan saham pemohon, terma-terma dan syarat-syaratnya dikemukakan di dalam *Amended and Restated ESOS Bye-Laws* of Maxis Communication Bhd ('Maxis Bye-laws'). Selepas opsyen tersebut diterima oleh pekerja-pekerja yang layak melalui borang penerimaan, opsyen tersebut akan terletakhak berdasarkan jadual letakhak seperti yang dipersetujui oleh kedua-dua pihak dan opsyen tersebut akan boleh dilaksanakan pada masa yang relevan. Pada 24 Mei 2007, Binariang melancarkan tawaran untuk memperoleh kesemua saham pengundian di dalam syarikat pemohon. Selari dengan tawaran tersebut, tawaran ECC dibuat kepada pekerja-pekerja perayu berkaitan dengan opsyen tidak terletakhak. Di bawah ECC, pekerja-pekerja menerima balasan alternatif sebagai ganti atau dalam pembatalan kesemua opsyen tidak terletakhak yang tertunggak. Jumlah tunai akan hanya dibayar kepada mereka dalam ansuran menurut jadual letakhak yang asal beraplikasi kepada opsyen tertunggak. Pemohon membuat pendirian bahawa bayaran yang dibuat berikutan ECC kepada pekerja-pekerja mesti dilaporkan sebagai pendapatan di dalam kenyataan pendapatan pekerja-pekerja bagi tahun di mana opsyen tersebut dikeluarkan, seperti yang dinyatakan di dalam s 25(1A) Akta Cukai Pendapatan 1967 ('Akta') dan bayaran untuk mencukai pendapatan tersebut terangkum di bawah s 32(1A) Akta tersebut. Responden-responden walau bagaimanapun memutuskan bahawa ECC yang diterima oleh pekerja-pekerja pemohon bagi opsyen tidak terletak hak terangkum di bawah s 25(1A) Akta. Pemohon memohon untuk semakan kehakiman memohon perintah certiorari untuk membatalkan keputusan responden. Persoalan yang timbul untuk pemutusan adalah sama ada bayaran yang diterima oleh pekerja-pekerja pemohon untuk opsyen yang tidak terletak hak berkaitan dengan ECC perlu ditangani sebagai pendapatan pekerja-pekerjanya bagi tahun di mana pekerja-pekerjanya menerima bayaran sedemikian atau bagi tahun di mana pekerja-pekerjanya melaksanakan, meletakhak, melepaskan atau memperoleh opsyen yang diberikan kepada mereka.

Diputuskan, membenarkan permohonan dengan kos:

(1) Prasyarat kepada aplikasi s 25(1A) Akta adalah kewujudan hak untuk memperoleh saham. Di dalam kes ini, kewujudan tersebut hanya boleh dilihat dari dokumen-dokumen berkaitan, iaitu, surat tawaran dan penerimaan, Maxis Bye-Laws dan *Employee Share Option Scheme Benefit Public Ruling* No 4/2004 dari mana hak tersebut didapati dan/atau diberikan kerana ia tidak didefinisikan di mana-mana di dalam Akta tersebut. Di bawah klausa 6 Maxis Bye-Laws, setiap pemberian di bawah pelan Maxis ESOS dibuat melalui tawaran rasmi syarikat pemohon yang diterima oleh pekerja-pekerja mereka yang layak dan disokong oleh balasan yang mengikat RM1. Ini mewujudkan kontrak mengikat yang sah di mana pekerja-pekerja diberikan hak yang boleh dilaksanakan

terhadap saham syarikat pemohon. Tawaran ini menjadi kontrak apabila ia diterima oleh pekerja tersebut dengan mengisi borang penerimaan (lihat perenggan 30–31 & 33).

(2) Fakta bahawa opsyen tersebut hanya akan terletakhak berdasarkan kepada jadual peletakhakkan adalah tidak penting. Ini adalah disebabkan oleh fakta bahawa s 25(1A) tidak mengenakan apa-apa unsur perletakhakan sebelum kebolehgunaan. Apa yang penting adalah bahawa, bagaimana hak tersebut berbangkit. Di dalam kes ini, hak tersebut berbangkit daripada kontrak yang mengikat: melalui tawaran rasmi untuk memberikan opsyen untuk melanggan saham Maxis dan penerimaannya oleh pekerja-pekerjanya yang layak. Dengan itu, pemberian opsyen memberikan hak untuk memperoleh saham pada masa pemberian tersebut (lihat perenggan 34–35).

(3) Dengan itu, adalah salah untuk responden bergantung pada klausa 7.1.1 Maxis Bye-laws untuk menentukan kebangkitan hak untuk memperoleh saham di bawah s 25(1A) Akta Akta. Peruntukan tersebut berkenaan dengan keadaan apabila opsyen tersebut menjadi boleh dilaksanakan. Ia tidak berkait kepada suatu yang membangkitkan hak untuk memperoleh saham di dalam syarikat pemohon (lihat perenggan 37–38).

(4) Hak-hak untuk memperoleh saham di dalam kes ini dilepaskan apabila pekerja-pekerja berkaitan menyerahkan opsyen mereka yang tidak terletakhak untuk pembatalan. Seksyen 25(1A) beraplikasi kepada pendapatan kasar berkaitan dengan pekerja-pekerja yang menerima bayaran di bawah ECC dan bayaran bagi cukai terangkum di bawah s 32(1A) Akta (lihat perenggan 46–47).]

Notes

For cases on assessment, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2384–2414.

Cases referred to

Abbott v Philbin [1961] AC 352, HL (refd)

Commissioners of Inland Revenue v Wesleyan & General Assurance Society [1948] 30 TC 11, HL (refd)

Director General of Island Revenue v Highlands Malaya Plantations Ltd [1988] 2 MLJ 99, SC (refd)

Inland Revenue Commissioners v Burton Group Plc [1990] STC 242 (refd)

Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

Pepper (Inspector of Taxes) v Hart [1993] AC 593, HL (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Worker's Union [1995] 2 MLJ 317; [1995] 2 CLJ 748; [1995] 2 AMR 1601, CA (refd)

A *Tan Meng Yung v Telekom Malaysia Bhd* [2006] 2 CLJ 684, HC (refd)
Wilcock (Inspector of Taxes) v Eve [1995] STC 18 (refd)
Williamson (Inspector of Taxes) v Dalton [1981] STC 753 (refd)

Legislation referred to

B Finance Act 2005 s 3
Finance Act 2009
Income Tax Act 1967 ss 2, 13, 13(1), 25, 25(1), (1A), 32(1), 32(1A), 83(1)
Rules of the High Court 1980 O 53 r 2
Securities Commission Act 1993 s 34

C *Rishwant Singh (P Jayasingam and M Gandhi with him) (Zul Rafique & Partners) for the applicant.*
Norhisham Ahmad (Arshad Hishamuddin with him) (Inland Revenue Board) for the respondents.

D **Mohd Zawawi J:**

INTRODUCTION

E **[1]** This case concerns an application by the applicant for judicial review under O 53 r 2 of the Rules of the High Court 1980 ('RHC 1980') for an order of certiorari, inter alia, to quash the respondents' decision dated 10 October 2008 ('impugned decision').

F **[2]** The following affidavits have been filed by the parties herein in respect of the said application:

(a) the affidavit in support of the applicant affirmed by Encik Azmi bin Hj Ujang on 25 November 2008 ('said supporting affidavit') (encl 3);

G (b) the affidavit in reply by the respondents affirmed by Puan Siti Aminah bt Ismail on 24 June 2010 ('said affidavit in reply of the respondent') (encl 19); and

(c) the affidavit in reply by the applicant affirmed by Encik Azmi bin Ujang on 6 July 2010 ('said reply affidavit of the applicant')(encl 27).

H

[3] After scrutinising the cause papers, reading and hearing the submissions of the applicant and respondent, the court allowed this application with cost at RM5,000. I shall now deliver my reasons.

I

FACTUAL BACKGROUND

[4] The case between the parties revolves around the tax treatment to the equivalent cash consideration received by the applicant's employees who hold

unvested options, pursuant to the conditional take-over offer made by Binariang GSM Sdn Bhd. The brief facts of the case are as follows:

(a) On 1 July 2002, the applicant has implemented the 2002 Maxis Employee Share Option Scheme ('Maxis ESOS') where eligible employees have been granted options in respect of the applicant's shares, the terms and conditions of which were set out in the Amended and Restated ESOS Bye-Laws of Maxis Communication Bhd ('Maxis Bye-laws');

(b) after the options have been accepted by the eligible employees through the acceptance form, *the option will be vested based on the vesting schedule as agreed by both parties and the option shall be exercisable at the relevant times*; (Emphasis added.)

(c) on 3 May 2007, Binariang GSM Sdn Bhd ('Binariang') served a notice of conditional take-over on the board of directors of the applicant's company;

(d) on 24 May 2007, Binariang launched a conditional take-over offer ('the offer') to acquire all voting shares in the applicant's company for a determined cash consideration;

(e) parallel to the conditional take-over offer, the following offers were made available to the employees of the applicant who are holders of outstanding options under the Maxis ESOS:

(i) 'Exercise and Accept Offer' in respect of vested/exercisable options where the employees who hold vested options granted under the Maxis ESOS must exercise their options to purchase Maxis shares before the take-over in order to be entitled to accept the offer by Binariang; and

(ii) 'Equivalent Cash Consideration' in respect of unvested options.

(f) in connection with the offer and the request made by Binariang, the board of directors of the applicant have resolved to invoke cl 10 of the Maxis ESOS bye-laws where the holders of unvested options are entitled to a payment of equivalent cash consideration (ECC) in accordance with the vesting schedule for such unvested options;

(g) the problem in the instant case is, with regard to the payment of ECC received by the employees with unvested options;

(h) under the ECC, the employees receive an alternative consideration in substitution or in cancellation of all outstanding unvested options. The cash amount would only be paid to them in tranches according to the original vesting schedule applicable to the outstanding options;

(i) the ECC was communicated to each of the holders of unvested options

by way of letters dated 23 July 2007. Employees were required to revert within five days from the date of the communication to accept the ECC offer;

(j) as at 22 June 2007, Binariang held 99.31% of the entire issued and paid up share capital in the applicant's company and has invoked s 34 of the Securities Commission Act 1993 to compulsorily acquire all remaining shares in the said company; and

(k) in view of the conditional take-over offer, the applicant had made references via various letters to, and discussions with, the respondent for their confirmation on, inter alia, the taxation of the ECC received by the applicant's employees with unvested options before they could proceed with filing of the applicant's return of remuneration by an employer (Form E) and with reporting the taxable income arising from the offer in the respective employees' annual income statement (Form EA).

IMPUGNED DECISION

[5] By letter dated 10 October 2008, the respondent took the following position that:

(a) pursuant to cl 7.1.1 of Maxis ESOS Bye-laws, the options only vested from the date of the first anniversary that the employee is offered the option and not from the date of grant;

(b) consequently, an employee does not have any right in an unvested option before the date of the first anniversary and the requirement that there be a '… right to acquire shares in a company …' in sub-s 25(1A) of Act 53 is not fulfilled;

(c) from a legal standpoint, before the amendment to sub-s 25(1) and 32(1) of Act 53, these unamended provisions did not apply to unvested options which were the subject of the ECC. This is because the ECC offered to the employees were not offered in their original form ie as shares and the price has been ascertained without reference to the material market value. It is also not subject to market risks as ordinary ESOS scheme are;

(d) when the applicant employs cl 10.1 of the Maxis ESOS Bye-laws, the applicant substitutes the cancellation of the Maxis ESOS with an alternative consideration. In this instance, the applicant's employees are paid an alternative consideration in return for the cancellation of the Maxis ESOS. The alternative consideration is no longer, in the form of shares which need to be valued, and to the contrary, it is the receipt of cash arising from employment; and

(e) the applicant's employees are not offered fresh share options as a consequence of the takeover and instead are paid a sum of money the

value and timing of which is based on the Maxis ESOS. Further, the applicant's employees do not have to pay anything to receive the said payment and this is different from the ordinary ESOS where an employee has to make payment to enforce the offer of shares given to him.

[6] Dissatisfied with the impugned decision, on 26 November 2008, the applicant filed this present application.

SUBMISSIONS BY LEARNED COUNSEL FOR THE APPLICANT

[7] The nub of the applicant's submission is that the payments made pursuant to the ECC to its employees must be reported as income in its employees income statement for the year in which the option is released,as enunciated in sub-s 25(1A) of Act 53 and the treatment to tax the income falls under sub-s 32(1A) of the same Act.

[8] This is because, the eligible applicant's employees have received rights to acquire Maxis shares at the grant date which is made by a formal offer which then accepted by the employee and supported by binding consideration of RM1. Hence, the acceptance of the ECC offer gives rise to the release event which is the taxing point of a right to acquire shares under sub-s 25(1A) and 32(1A) of Act 53.

[9] In support of his argument, learned counsel cited the following decisions:

(a) *Wilcock (Inspector of Taxes) v Eve* [1995] STC 18;

(b) *Abbott v Philbin* [1961] AC 352;

(c) *Inland Revenue Commissioners v Burton Group Plc* [1990] STC 242;

(d) *Williamson (Inspector of Taxes) v Dalton* [1981] STC 753; and

(e) *Tan Meng Yung v Telekom Malaysia Bhd* [2006] 2 CLJ 684.

SUBMISSIONS BY LEARNED COUNSEL FOR THE RESPONDENTS

[10] On the other hand, it is the stance of the respondents that the ECC received by the applicant's employees for the unvested option does not fall under sub-s 25(1A) of Act 53.

[11] The respondents posit that pursuant to cl 7.1.1 of Maxis ESOS Bye-laws, the options only vested from the date of the first anniversary that the employee is offered the option and not from the date of the grant.

[12] Consequently, an employee does not have any rights in an unvested

option before the date of the first anniversary and the requirement that there be a '… a right to acquire shares in a company …' in sub-s 25(1A) of Act 53 is not fulfilled.

[13] Thus, the ECC payment should be treated under sub-s 25(1) of Act 53 and should be reflected in its' employees income statement for the year in which its employees receive such payment.

[14] In support of his submissions, learned counsel cited the following decisions:

(a) *Commissioners of Inland Revenue v Wesleyan & General Assurance Society* [1948] 30 TC 11; and

(b) *Director General of Island Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99.

FINDINGS OF THE COURT

Issue

[15] After having carefully considering the submissions advanced by learned counsels, to my mind, the only issue to be decided in the instant case is this: Whether payment received by the applicant's employee for the unvested options in term of ECC should be treated as its employees income statement for the,year in which its employees receive such payment or for the year in which its employees exercised, assigned, released or acquired the options granted to them.

[16] In order to determine the issue, regard must be had to the true interpretation of sub-s 25(1A) of Act 53.

OBLIGATION OF THE EMPLOYER

[17] It is not in dispute that every employer, including the applicant, is obliged to prepare and deliver an annual return in the prescribed forms to the Inland Revenue Board of Malaysia ('IRBM') containing:

(a) the names and places of residence of such classes of persons employed by the employer; and

(b) the full amount of the gross income falling within s 13 paid, payable or provided by or on behalf of the employer to those persons in respect of their employment.

(See sub-s 83(1) of Act 53).

[18] Therefore, the return should be prepared in a full, correct and true amount according to the year of assessment. If the unvested share option is considered as the right to acquire shares in the applicant's company, the amount to be included in his gross income from the employment shall be calculated based on s 32(1A) of Act 53 for the year in which the right is exercised, assigned, released or acquired as enunciated in s 25(1A) of Act 53. Failing which, the payment received will be considered as a gross normal income under s 13(1) of Act 53 and the treatment to tax the income falls under s 25(1) of Act 53 which must be reflected in their income statement for the year in which they receive the payment.

SUBSECTIONS 25(1) AND 25(1A) OF ACT 53

[19] At the outset, it is necessary to see how the courts have interpreted tax statutes.

[20] Gopal Sri Ram JCA (as he then was) in *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 at p 130; [2004] 2 CLJ 265 had this to say at p 299:

> [T]he correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:
>
> > First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at p 208, moral precepts are not applicable to the interpretation of revenue statutes.
> >
> > Secondly, '… one has to look merely at what is clearly said. There is no room for any intendment, there is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at p 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 1 All ER 499, [1946] AC 119.
> >
> > Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result,, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
> >
> > Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[21] Section 25 of Act 53 is, generally, about the determination of year of assessment to which gross income from an employment is related, (see s 2 of Act 53).

[22] Before 1 October 2005, s 25(1) of Act 53 reads as follows:

(1) Where gross income from an employment —

(a) is not receivable in respect of any particular period; and

(b) first becomes receivable in the relevant period,

it shall when received be treated as gross income of the relevant person for the relevant period.

[23] It is clear, therefore, that the assessability of employment income is on receipt basis.

[24] However, then, by virtue of Finance Act, 2005 ('Act 644') and Finance Act, 2009 ('Act 693'), s 25(1) was amended as follows:

1 Subject to subsection (1A), or (2A) where gross income from an employment —

(1) is not receivable in respect of any particfular period; and

(2) first becomes.receivable in the relevant period,

it shall when received be treated as gross income-of the relevant person for the relevant period.

(1A) The gross, income from an employment in respect of *any right to acquire shares in a company* of the kind to which paragraph 13(1)(a) applies, shall' where the right *is exercised, assigned, released or acquired* in the relevant period be treated as gross income of the relevant person for that relevant period. (Emphasis added.)

[25] The above said amendment, in my considered view, would have different impact. The court is of the opinion that what interpretation is to be given to the words should depend upon the court's perception of the purpose of the provision and the context of the words.

[26] For that reason, the court refers to the explanatory statement to the finance bill 2005, from which, the new sub-s (1A) was introduced.

[27] According to the said statement, the new subsection was inserted so that the gross income in respect of any right to acquire shares in a company is taxed in the year where the right is exercised, assigned, released or acquired. This amendment will only have effect for the year of assessment 2006 and subsequent years of assessment: (See s 3 of Act 644).

[28] It is settled law that the court may refer to Parliamentary material as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Lord Griffiths in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 said:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

RIGHT TO ACQUIRE SHARE

[29] Viewed in the above said light, it is dear that the prerequisite to the application of sub-s 25(1A) of Act 53 is the existence of the right to acquire, share.

[30] Reverting to the case at hand, this existence could only be traced from the respective documents, namely, letter of offer and acceptance, Maxis Bye-Laws and Employee Share Option Scheme Benefit Public Ruling No 4/2004 from which the right is derived and/or granted as, it is nowhere defined in Act 53 itself.

[31] Under cl 6 of the Maxis Bye-Laws, each grant under the Maxis ESOS plan was made by a formal offer of the applicant's company which was accepted by their eligible employees and supported by binding consideration of RM1. This, to my mind, has created a legally binding contract where the latter were granted enforceable rights to shares of the former

[32] A sample letter of offer exhibited and marked as 'B' in the said supporting affidavit states, inter alia:

> An offer is hereby made to grant you an Option, in consideration of the payment a non-refundable Option; Acceptance Fee of Ringgit Malaysia One (RM1.00) only to subscribe for and be allotted 6,000 ordinary shares of par value RM0.10 ("Shares") in the Company at the price of RM8.54 per share.
>
> …
>
> If you wish to accept the offer, please print, sign and return to the Scheme Administrator the Acceptance. Form together with a non-refundable Option Acceptance Fee of RM1.00 only not later than 6.30 pm Malaysian time on 13th January 2006, failing which this offer will automatically lapse.

[33] The above said offer becomes a contract when it was accepted by the

respective employee by filling in the acceptance form, a sample of which has also been exhibited and marked as 'B' in the same affidavit which, inter alia, states:

> I hereby accept the Option to subscribe for RM6,000 Shares at RM8.54 per Share and enclose cash for Ringgit Malaysia One (RM1.00) only being the Option Acceptance Fee, and by paying the Option Acceptance Fee.

[34] The fact that the options will only be vested based on the vesting schedule is, in my considered opinion, immaterial. This is due to the fact that sub-s 25(1A) does not impose any vesting element before its applicability. What does matter is that, how does the said right arise.

[35] In this instant case, it is clear that the right arises from the binding contract: by virtue of the formal offer to grant options to subscribe for Maxis shares and its acceptance by their eligible employees. Thus, the grant of the option gives rise to a right to acquire shares at the point of the grant.

[36] Employee Share Option Scheme Benefit Public Ruling No 4/2004 defines the terms 'option' as right offered in respect of a number of shares at a specific price to be exercised at a future date. When does the offer take place is dependent on the date the employer offers their employee the right to purchase a number of shares in the company which is at the point of grant.

[37] Based on the above reason, with respect, it is wrong for the respondent to, rely on cl 7.1.1 of the Maxis Bye-laws to determine the rise of the right to acquire share under sub-s 25(1A) of Act 53.

[38] According to its plain reading, to my mind, the provision concerns on the circumstances of when the option become exercisable. It does not relates to the ones which give rise to the right to acquire share in the applicant company.

[39] Having given this matter my most careful consideration, I have come to the conclusion that the grounds relied by the respondent is devoid of merit.

THE RIGHT TO ACQUIRE SHARE IS RELEASED

[40] The court shall now proceed to consider the taxing point of a right to acquire shares under sub-s 25(1A) of Act 53. The subsection clearly provides that the gross income in respect of any right to acquire shares in a company is taxed in the year where the right is *exercised, assigned, released or acquired*. (Emphasis added.)

[41] As can be seen from the highlighted words above, it is sufficient for the court to determine the taxing point if any one of the situations set out is met. The word 'or' appearing at the end of the sentence which underlines the circumstances, clearly indicates that the four situations are to be read disjunctively. This is not disputed.

[42] In the instant case, in consideration of the applicant's company to pay the ECC in respect of all outstanding unvested options, the respective employees have agreed to surrender *all such options for cancellation*. (Emphasis added.)

[43] This acceptance, according to learned counsel for the applicant, gives rise to the 'release' event which is the taxing point of a right to acquire shares under sub-s 25(1A).

[44] The word 'release' is not defined under Act 53. Thus, it may be permissible to refer to the dictionary, to find out the meaning of the word as it understood in the common parlance.

[45] 'Release' has been defined as 'the act of giving up a right or claim to the person against whom it could have been enforced' (see *Black's Law Dictionary* (7th Ed); 'a gift, discharge, or renunciation of a right of action' (see *The Dictionary of English Law*); 'surrender (a right)' (see *The Concise Oxford Dictionary of Current English* (8th Ed) and 'the act or writing by which some claim or interest is surrendered to another, the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised or enforced' (see *The Law Lexicon The Encyclopedic Law Dictionary with Legal Maxims, Latin Terms, Words & Phrases* (2nd Ed)).

[46] Based on the above definitions, the court finds that the rights to acquire share in the instant case were released when the respective employees surrendered their unvested options for cancellation.

[47] The court wholly agrees with the submissions by learned counsel for the applicant. The court has hesitation to hold that sub-s 25(1A) is applicable to the gross income in respect of the employees who received payment under ECC and the treatment to tax falls under sub-s 32(1A) of the same Act.

[48] Subsection 32(1A) reads:

> (1A)(a) Where in the relevant period a relevant person acquired any right to acquire shares in a company of the kind to which paragraph 13(1)(a) applies, under his name or in the name of his nominee or agent, the amount in respect thereof to

be included in his gross income from the employment shall be —

(i) the market value of the shares where the right shall be exercised, assigned, released or acquired on a specified date or where the right shall be exercised, assigned, released or acquired within a specified period, the first day of that period; or

(ii) the market value of the shares on the date of the exercise, assignment, release or acquisition of the right,

whichever is the lower less the amount paid for the shares.

(b) In this subsection, 'market value' means —

(i) in the case of a company listed on any stock exchange, the average price of the shares which is ascertained by averaging the highest and the lowest price of the shares for the day; or

[(b) (i) Am. Act 693/2009:s.12]

(ii) in any other case, the net asset value of the shares for the day.

[49] This sub-s 32(1A) of Act 53 was introduced to provide the method to ascertain the gross income of a person from an employment in respect of any right to acquire shares in a company.

[50] The gross income shall consist of the market value of the shares at the time the right is exercisable or the market value of the shares at the time the right is exercised, whichever is the lower, less the amount paid for the shares. (See Explanatory Statement to Finance Bill 2005).

CONCLUSION

[51] Based on the reasons stated above, the court is of the considered opinion that the respondent had misconstrued the law which warranted the court to interfere by way of judicial review.

[52] In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Worker's Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748; [1995] 2 AMR 1601, Gopal Sri Ram (as he then was) has said:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker makes such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure …, or where the decision reached is, unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

[53] I take the view that this application has merits. The application is allowed with cost at RM5,000. A

Application allowed with costs.

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Reported by Kanesh Sundrum

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